92-1600

No.

Supreme Court, U.S.
F
MAR 3 1 1993
OFFICE OF THE CLERK

In The

The Supreme Court of the United States

October Term, 1992

THE PARSONS CORPORATION AND
THE RALPH M. PARSONS COMPANY,

Petitioners,

v.

STATE OF ALASKA, DEPARTMENT OF REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

PETITION FOR WRIT OF CERTIORARI

Lance B. Gordon
Counsel of Record
Jordan P. Weiss
The Parsons Corporation
100 West Walnut Street, T-1105
Pasadena, California 91124
(818) 440-3010
Counsel for Petitioners

QUESTIONS PRESENTED

1. Do Alaska's tax adjudicative procedures (*viz.*, the power of the Commissioner of the Department of Revenue to decide tax controversies and thwart judicial review) create such a predilection for bias, as evidenced by the fact that no nonresident corporation has ever prevailed in the Alaska Supreme Court in an income tax case, that no meaningful opportunity for a hearing exists?

2. Were the Alaska Supreme Court's *de facto* denial of the existence of stipulated facts and articulation of new rules of law based upon the nonexistence of such facts adequate and tenable state grounds for avoiding this Court's review?

3. Did the Alaska Supreme Court's application of Alaska law to a contract between California residents who (1) selected California law to govern the interpretation of their contract, and (2) negotiated, signed and predominantly performed their contract in California, unduly burden interstate commerce and effect cumulatively a deprivation of due process of law?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. The Alaska Court Opinion Denies Engineer Due Process Of Law By Articulating Only The Few Facts Superficially Inconsistent With Agency And Refusing To Address The Lower Court's Analysis And Facts Demonstrating Agency..... 7

TABLE OF CONTENTS--Continued

Page

II. The Alaska Procedure For Adjudicating Income Tax Cases Violates Due Process By Denying Access To An Impartial Decision Maker 10

III. The Alaska Court Based Its Decision On An Untenable Interpretation Of Agency Law In An Attempt to Discriminate Against Interstate Commerce 15

IV. Alaska's Choice of Alaska Law And Rejection of California Law On The Issue of Agency Unduly Burden Interstate Commerce and Deny Engineer Due Process of Law..... 16

V. There Is An Urgent Need to Clarify The Rules Which Apply To Choice-Of-Law Decisions In An Interstate Commerce Context..... 21

CONCLUSION..... 22

APPENDICES UNDER SEPARATE COVER

TABLE OF AUTHORITIES

CASES Page

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981)..... 21

Central Georgia Railway Company v. Murphey, 196 U.S. 194 (1905)..... 20

Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981)..... 9

Dennis v. Higgins, 498 U.S. 439 (1991)..... 9

Erie Railroad v. Tompkins, 304 U.S. 64 (1938)..... 20

Fuentes v. Shevin, 407 U.S. 67 (1972)..... 10

Gibbons v. Ogden, 22 U.S. 1 (9 Wheat. 1) (1824)..... 20

Green Construction Company v. State, Department of Revenue, 674 P.2d 260 (Alaska 1983)..... 5

Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979) 9

Healy v. Beer Institute, 491 U.S. 324 (1989) 19

Home Ins. Co. v. Dick, 281 U.S. 397 (1930)..... 18

Huber Pontiac, Inc. v. Allphin, 431 F. Supp. 1168 (S.D. Ill. 1977)..... 14

Huber Pontiac, Inc. v. Whitler, 585 F.2d 817 (7th Cir. 1978) 14

James v. Kentucky, 466 U.S. 341 (1984)..... 15

Mathews v. Eldridge, 424 U.S. 319 (1976) 7, 9

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)..... 8

Monroe v. Thigpen, 932 F.2d 1437 (11th Cir. 1991) 8

Morrissey v. Brewer, 408 U.S. 471 (1972) 7

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 17

Richmond & A. R. Co. v. R. A. Patterson Tobacco Co., 169 U.S. 311 (1898) 20

Stanley v. Illinois, 405 U.S. 645 (1972) 10

Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) 18, 20

Taylor v. McKeithen, 407 U.S. 191 (1972) 7

Townsend v. Burke, 334 U.S. 736 (1948) 8

Tumey v. Ohio, 273 U.S. 510 (1927) 12

Ward v. Monroeville, 409 U.S. 57 (1972) 12

Withrow v. Larkin, 421 U.S. 35 (1975) 13, 14

Zobel v. Williams, 457 U.S. 55 (1982) 16

STATUTORY PROVISIONS

28 U.S.C. § 1257(a) 2

Alaska Stat. § 43.05.150 ..... 2, 12

Alaska Stat. § 43.05.010 ..... 2, 12

Alaska Stat. § 43.05.040 2

Alaska Stat. § 43.05.240 ..... 2, 4

Alaska Stat. § 43.19.010 2

Alaska Stat. § 44.25.010 2

Alaska Stat. § 44.25.020 ..... 2, 4, 12

OTHER AUTHORITY

Alaska Admin. Code tit. 15, § 05.030 (Effective May, 1976; amended April, 1968; April, 1989).....4, 11

Alaska Admin. Code tit. 15, § 05.035 (Effective December, 1980; amended April, 1988) 11

Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249 (1992) 21

Restatement (Second) of Conflict of Laws § 187(1), 188..... 16, 17, 19

Restatement (Second) of Agency..... 8

CONSTITUTIONAL PROVISIONS

Article I, Section 8..... 2, *passim*

Amendment XIV, Section 1 ..... 2, *passim*

In the

THE SUPREME COURT OF THE UNITED STATES

October Term 1992

No.

THE PARSONS CORPORATION AND
THE RALPH M. PARSONS COMPANY
Petitioners,

v.

STATE OF ALASKA, DEPARTMENT OF REVENUE
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

Petitioners respectfully request this Court to issue a writ of certiorari to review the judgment of the Supreme Court of Alaska or, in the alternative, to reverse summarily the Alaska Court's judgment.

OPINIONS BELOW

The opinion of the Supreme Court of Alaska (A. 1a) is reported at 843 P.2d 1238 (Alaska 1992). That Court's order denying Petitioners' Petition for Rehearing (A. 12a) is unreported. The opinion of the Superior Court of the State of Alaska (A. 14a) is an unreported decision. The opinion of the Alaska Department of Revenue ("DOR") Hearing Officer (A. 26a) is also unreported.

JURISDICTION

In response to Petitioners' Petition For Rehearing (A. 113a), the Alaska Supreme Court ("the Alaska Court") withdrew its previous opinion, substituted its final judgment dated December 31, 1992, and denied Petitioners' Petition for Rehearing except to the extent the final judgment was modified from the previous opinion. This petition is timely filed. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant portions of the following constitutional and statutory provisions are reproduced in A. 123a: United States Constitution, Article I, section 8, clause 3 (the Commerce Clause); United States Constitution, Amendment XIV, Section 1 (the Due Process Clause); and Alaska Statutes ("AS") 43.19.010, Art. IV. (the Uniform Division of Income For Tax Purposes Act, "UDITPA"); AS 43.05.150, AS 43.05.010, AS 44.25.020, AS 44.25.010, AS 43.05.040, and 43.05.240.

STATEMENT OF THE CASE

The Parsons Corporation, its subsidiary, The Ralph M. Parsons Company and their subsidiaries ("Engineer") comprise one of the world's largest engineering organizations. Engineer's group of companies supports the worldwide environmental, transportation, energy, and natural resource industries and government clients. See A. 129a for a list of subsidiaries under Rule 29.1.

Beginning in 1971, Engineer contracted with an independent oil company ("OILCO") to design, procure and fabricate oil and gas field facilities for Prudhoe Bay, Alaska. One of Engineer's assignments was to purchase materials and equipment for the project. OILCO and Engineer agreed their relationship would be governed by California law.

The DOR and Engineer stipulated to the following facts, *inter alia*, about Engineer's and OILCO's relationship:

(1) OILCO exercised absolute "control over the procurement process from acquisition to final approval, including from whom, under what terms, what type, how and where the materials were acquired";

(2) Engineer could procure materials only from specific OILCO-approved vendors;

(3) OILCO required its approval for all but *de minimis* materials purchases and OILCO's counsel approved the terms and conditions of all purchase contracts;

(4) Engineer did not warrant materials it procured for OILCO; OILCO assumed all risks of loss and insured all materials acquired against loss or damage;

(5) OILCO funded all procurement and controlled use of its money through a zero balance account ("ZBA") bank account at OILCO's bank. ZBA deposits could only be used for OILCO-approved purchases and subcontracts;

(6) For materials procured outside Alaska, formal legal title vested in OILCO when the materials were received in Alaska;

(7) OILCO could compel Engineer to transfer any procured materials anywhere, even another state or country, without additional compensation, because the parties regarded the materials as always owned by OILCO;

(8) OILCO had direct contractual privity with vendors for guarantees, inspection rights and indemnifications.

California and Alaska have adopted UDITPA as the method for apportioning income between the states. UDITPA satisfies the Commerce and Due Process Clauses by apportioning a taxpayer's income among different states through use of a three factor formula based upon property, payroll and sales. The sales factor sections source revenue

from the sale of tangible personal property to the property's destination and source all other revenue, including revenue from services, to the place where the majority of costs of performance are incurred (outside of Alaska in the instant case).

After reviewing the contracts between Engineer and OILCO, the DOR auditor contended that Engineer was not OILCO's agent, but rather a seller of property, and sourced Engineer's revenues from its OILCO contracts to Alaska even though Engineer's services were performed outside Alaska. Engineer appealed this determination to a DOR "Formal Hearing."

The DOR was represented at the Formal Hearing by the Hearing Officer appointed by the DOR Commissioner and a DOR attorney acting as the DOR's advocate.[1] The DOR Hearing Officer upheld the DOR auditor and found that Engineer sold property rather than acted as agent.

As required under Alaska law for the DOR Hearing Officer decision to become effective, the decision was approved and adopted by the DOR Commissioner. *See* AS §44.25.020, Alaska Admin. Code tit. 15, §05.030.

Engineer appealed the Commissioner's Formal Hearing decision to the Alaska Superior Court (hereafter "the Lower Court") under AS §43.05.240(d).

The Lower Court applied the independent judgment standard of review and substituted its own judgment for the DOR's on legal matters. The Lower Court reversed the Hearing Officer and held that Engineer provided purchasing agency and engineering services to OILCO and should not be taxed as a seller of property.

---

[1] The same person acted as both the informal hearing officer and the DOR attorney representing the DOR before the DOR Hearing Officer.

The DOR appealed the Lower Court's decision to the Alaska Court. On December 31, 1992, the Alaska Court first ruled on the appropriate standard of review by Alaska Courts on DOR decisions, holding Alaska Courts *"will not reverse DOR's decision if there is a reasonable basis to support it."* (Italics added). (A. 6a).

Both parties to this case agree that an agent cannot sell property procured as agent of the principal. Thus, the central issue before the Alaska Court was correctly summarized by the court as follows:

> The income tax results in this case depend upon the classification of [Engineer's] business activity. If [Engineer] acted as a manufacturer and seller of oil field modules its revenues were for the 'sale of tangible personal property.' If Engineer acted as a contractor who procured materials as a purchasing agent and was paid for skills and services provided, its revenues were from sales other than sales of tangible personal property. (A. 7a).

Because Alaska tax law has adopted no special rules to characterize the relationship of the parties for tax purposes, the Alaska Court looked to Alaska general agency law. The Alaska Court analyzed the issue in a single footnote rejecting the application of California agency law, citing no authority for such rejection, and omitting the material facts stipulated by the parties and relied upon by the Lower Court.[2] (A. 8a).

---

[2] The Alaska Court did not mention the principal Alaska decision, *Green Construction Company v. State, Department of Revenue*, 674 P.2d 260 (Alaska 1983), relied upon by the Lower Court, the Hearing Officer, the Attorney General, and Engineer. Engineer also specifically requested that the Alaska Court address the omitted facts in Engineer's Motion for Rehearing. (A. 119a). While the Alaska Court corrected other errors in its opinion, including erroneous reliance on a regulation,

The footnote stated that Engineer took title to materials procured for OILCO until delivered, hired and insured its own employees, warranted its engineering work, was labeled an independent contractor and used its name on top of the purchase orders. The Alaska Court nevertheless acknowledged that Engineer provided agency services.[3]

The Alaska Court stated "we are satisfied that the record contains a reasonable basis to support DOR's Decision 88-67" and held in favor of the Commissioner, thereby disregarding the Lower Court's decision and analysis. (A. 10a).

In upholding the imposition of additional Alaska taxes, the Alaska Court held, "[E]ven though most of Parsons' activities are conducted *outside of Alaska*, it is perfectly appropriate to attribute *all* of its revenues to Alaska, for sales factor purposes." (Italics added.) (A. 11a).

The determination of whether Engineer was an agent affects its rights and responsibilities in myriad areas of the law, including torts, contracts, sales, construction law, environmental liability, property and taxes. Here the effect of the agency question is on taxes, but the parties have stipulated the amount of taxes which will be paid if Engineer is and is not determined to have been an agent.

---

it refused to address the stipulated facts in its revised opinion. (A. 2a-4a).

[3] The Alaska Court stated "Parsons provided engineering, design, and agency procurement services from its home office in California." (A. 4a).

REASONS FOR GRANTING THE WRIT

I. THE ALASKA COURT OPINION DENIES ENGINEER DUE PROCESS OF LAW BY ARTICULATING ONLY THE FEW FACTS SUPERFICIALLY INCONSISTENT WITH AGENCY AND REFUSING TO ADDRESS THE LOWER COURT'S ANALYSIS AND FACTS DEMONSTRATING AGENCY

This case is part of a growing trend for state supreme courts to reverse well-reasoned lower court opinions with opinions which distort the nature of the case and hide the fallacy and partiality of the state supreme court's logic.

A comparison of the facts and arguments discussed in the Lower Court's unpublished opinion (A. 14a) to the facts and arguments articulated in the Alaska Court's opinion ("the Opinion") leaves the vivid impression that they are two completely different cases. The Opinion discusses only those of the stipulated facts which superficially support its ultimate conclusion and ignores those facts (even though stipulated), which it cannot square with its conclusion.

Applying the test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) to our facts, the "fundamental fairness" and "meaningful hearing" requirements of due process mandated that the Opinion describe the case candidly to expose the court's logic to public scrutiny. The *Mathews* test is applied below. Although other procedural protections often provide due process, this Court has frequently required important judicial and quasi-judicial decisions to be explained. *Taylor v. McKeithen*, 407 U.S. 191, 194-195 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 486-487 (1972); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Here, there are no other procedural safeguards in place to provide due process because it was the state supreme court which did not meaningfully explain its reversal.

When an administrative agency or a lower court obscures the real issues and facts in a case, the litigant invariably has an appeal process available which most often cures the problem and provides due process of law. However, when a state supreme court obscures the true nature of the litigation, due process and other federal constitutional rights are often, as here, denied.

Fundamentally more serious than a failure to give any reason for an opinion is for an opinion to give a distorted picture of the case. Where there is a complete absence of explanation of the central reasoning of a case, the public is put on notice that a court does not want its logic scrutinized. A false reason gives no such warning. *See Townsend v. Burke*, 334 U.S. 736 (1948) holding that it is a violation of due process to base a sentence on materially false information, and *Monroe v. Thigpen*, 932 F.2d 1437, 1442 (11th Cir. 1991).

The Alaska Court's Opinion appears to be adequately grounded but hides the fact that it completely disregards the law of the contract jurisdiction, the Restatement of Agency, Alaska's own case law and the material stipulated facts.

In contrast to the borderline facts mentioned by the Alaska Court, all of the undisputed facts which the Court ignored indicate that Engineer was OILCO's agent. The articulated peripheral facts were explained away convincingly and easily by the Lower Court. An agent does not have to be disclosed, an agent can have bare legal title, and an agent can be responsible for its own taxes, employees' torts and defective work.

The Due Process Clause forbids the deprivation of property without due process. The imposition of a tax is a "deprivation of property." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 (1990) (due process requires the state to provide a *meaningful opportunity to contest taxes*).

Due Process requires the policy being served by the State's procedure to be weighed against the burden placed on its targets:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (Citation omitted). *Mathews v. Eldridge*, 424 U.S. at 335.

The private interests affected by the official action are the Engineer's right to engage in, and enjoy the fruits of, interstate commerce and property rights in its money, which the DOR seeks to take. While the primary purpose of the Commerce Clause is to protect commerce, the right to engage in interstate commerce is also an important private right. *Dennis v. Higgins*, 498 U.S. 439 (1991). Protection of the national economy, the common market of the United States, is also a very important public interest.

On the second factor (the risk of erroneous deprivation and probable value of alternative procedural safeguards), failure to articulate an answer to the central reasoning of the Lower Court (which the Alaska Court overturned) deprives the litigants of the advantages of exposure of the Opinion's principal reasoning to public scrutiny. Such scrutiny increases its legitimacy and enhances its value as a predictor of development of the law. *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 34-35, 40 (1979) (Marshall, J, dissenting in part, "the obligation to justify a decision publicly would provide the assurance, critical to the appearance of fairness, that the Board's decision was not capricious."); *Connecticut Bd. of*

Pardons v. Dumschat, 452 U.S. 458 (1981) (Stevens, J., dissenting from a majority holding that Mr. Dumschat was not being deprived of "life, liberty, or property"):

> [Courts'] explanations of why they decided cases as they did provided guideposts for future decisions and an assurance to litigants that like cases are being decided in a similar way. [T]hose statements of reasons provided a better guarantee of justice than could possibly have been described in a code written in sufficient detail to be fit for Napoleon.

The merits of the substantive claim are irrelevant to due process. *Fuentes v. Shevin*, 407 U.S. 67, 92 (1972). However, had the Alaska Court articulated its analysis of the actual facts and arguments, it would have had a difficult time in justifying its decision.

The Alaska Court's legitimate interests in avoiding candor on the central question in cases are weak. Accurately describing the case might hurt speed and efficiency, but "[T]he Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

II. THE ALASKA PROCEDURE FOR ADJUDICATING INCOME TAX CASES VIOLATES DUE PROCESS BY DENYING ACCESS TO AN IMPARTIAL DECISION MAKER

The State of Alaska has violated due process of law by subjecting Engineer to an unconstitutionally biased administrative process because the opinion of the Hearing Officer is not effective until adopted by the Commissioner (Alaska Admin. Code tit. 15, § 05.030(i)), the very person responsible for collecting taxes, and may not be reversed by any Alaska court as long as the Commissioner has a

"reasonable basis." (A. 6a). This is true even if the DOR is wrong.

Alaska's "reasonable basis" standard of review must be barred if the guarantee of due process is to have meaning because the DOR Commissioner has a conflict of interest between his mission to collect taxes and his role as final authority in the administrative adjudication of disputes with out-of-state taxpayers. This process can only satisfy due process if the Commissioner's decisions are subjected to an "independent judgment" standard of review.

The essence of Alaska's appellate review of tax cases is that the DOR conducts an audit of taxpayers, the DOR evaluates out-of-state taxpayers through an informal hearing, the DOR attorney representing the DOR at the informal hearing represents the DOR before a hearing officer employed by the DOR. The DOR hearing officer is appointed by the Commissioner of the DOR and is required to obtain the approval of the Commissioner before the hearing officer's decision is final.

While the case may be appealed to the lower court, according to the Alaska Court, the lower court must uphold the DOR's decision so long as there is a "reasonable basis" for it. If there is a reasonable basis, the Lower Court cannot reverse the DOR even if it is convinced that the DOR is wrong. This procedure is inherently prejudicial and unconstitutional.

As a result, Alaska has created a tax collection process in which the DOR never loses. The Alaska Court has found in favor of the DOR in every corporate income tax appeal from the lower courts' review of Hearing Officer decisions. See A. 130a for a list of all DOR cases appealed to Alaska Court.

Here, the Alaska Court ignored the stipulated facts, the stipulated independent judgment standard of review, cited

authority, California agency law and its own finding that Engineer provided purchasing agency services to OILCO.[4]

The Federal Constitutional issues herein were raised initially in the Petitioners' Motion for Rehearing. (A. 121a). The issues were not raised previously because the parties had agreed that the independent standard of review applied; and, the Alaska Court's conduct surprised everyone.

The controlling authority condemning a hearing process where the adjudicator has organizational responsibility which conflicts with the interest of a litigant is *Ward v. Monroeville*, 409 U.S. 57 (1972). There, an Ohio statute authorized the mayor to adjudicate traffic offenses. A major portion of the village's income was derived from the fines, fees, and costs imposed in the mayor's court. This Court cited *Tumey v. Ohio*, 273 U.S. 510 (1927) and repeated its test, "whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused ...'" (409 U.S. at 60) and found a violation of due process.

Similarly, Alaska creates an incentive for the Commissioner to find against the taxpayer. The DOR Commissioner's principal statutory responsibilities are to collect taxes.[5] Since his decisions cannot be overturned if he provides a "reasonable basis," even if the reviewing court is convinced he is wrong, the process is inherently

---

[4] The Alaska Court found "Parsons provided engineering, design and agency procurement services from its home office in California." (A. 4a).

[5] AS §43.05.150, AS §43.05.010, AS §44.25.020, Alaska Admin. Code tit. 15, §05.035.

prejudicial and all but mandates a biased decision unless there is *de novo* review of at least the nontax legal decisions.

The Alaska tax procedure is distinguishable from the procedure in *Withrow v. Larkin*, 421 U.S. 35 (1975). *Withrow* stands for the rule that the combination of investigative and adjudicative functions in an administrative agency does not, without more powers vested in the agency, create an unconstitutional risk of bias in an administrative adjudication. *Withrow* recognizes, however, that such a risk may be shown in special circumstances.

The Court had before it a Wisconsin statute empowering a physician's examining board to investigate whether probable cause existed to institute criminal action for revocation of a physician's license and to suspend the license temporarily upon a determination that the licensee was guilty of a violation. The Court pointed out that a finding of probable cause did not necessarily prejudice the board on a later determination of guilt. The Court also observed that the board had organized itself internally to minimize the risk arising from combining investigation and adjudication. Thus, the Court held that the facts shown did not meet the test of unconstitutional risk of bias in administrative adjudication, which was stated as follows:

> It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weaknesses, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. *Withrow*, 421 U.S. at 54.

The Court was careful to note that its holding did not "preclude a court from determining from the special facts

and circumstances present in the case before it that the risk of unfairness is intolerably high." *Id.* Such is the case here.

The *Withrow* case is distinguished from this case in two important ways. In *Withrow*, the board possessed only investigative and adjudicative powers and did not act as prosecutor or advocate. Further, the board lacked any economic incentive or statutory mandate to find against the doctors it regulated. In sharp contrast, the Commissioner is statutorily charged with both the obligation to supply money for state operations and to make the final decision in taxpayer disputes. If the Commissioner does not collect enough taxes, he or she has to justify the failure. This procedure in itself creates an intolerable risk of unfairness. *See, e.g., Huber Pontiac, Inc. v. Allphin*, 431 F. Supp. 1168 (S.D. Ill. 1977), *vacated on other grounds sub nom. Huber Pontiac, Inc. v. Whitler*, 585 F.2d 817 (7th Cir. 1978). Had the *Withrow* board exercised similar powers, unquestionably this Court would have found a constitutional violation to have occurred.

Moreover, and overriding, the Alaska Court will reverse the DOR's decision only if the DOR lacks a reasonable basis for the decision. Under such circumstances, "under a realistic appraisal of psychological tendencies and human weaknesses," the DOR system of reviewing cases "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *See Withrow*, 421 U.S. at 47.

A similar but less biased procedure was condemned in *Huber Pontiac, Inc. v. Allphin*, 431 F. Supp. 1168. In that case, an automobile dealer challenged the process by which Illinois heard tax disputes. There, the hearing officer presided, presented the Illinois Department of Revenue's case, cross-examined witnesses, ruled on objections and on admissibility of evidence (although the evidence was placed

on the record so that the correctness of the ruling could be determined on appeal), and, when the hearing was completed, prepared a report, full record of the hearing and recommendations for the department's decision. Under those circumstances, the district court held that the combination of adversarial and adjudicative functions denied due process.

Engineer presented overwhelming evidence that it acted as its client's agent. Despite this overwhelming evidence and the DOR's willingness to stipulate to that evidence, the Alaska Court ignored it and ruled that Engineer sold tangible personal property even though there was no reasonable basis for this contention. The Alaska Court refused to even discuss the critical facts in its decision. This practice which evidences systemic bias, culminating with the standard of review, must be forbidden if the guarantee of due process is to mean anything.

III. THE ALASKA COURT BASED ITS DECISION ON AN UNTENABLE INTERPRETATION OF AGENCY LAW IN AN ATTEMPT TO DISCRIMINATE AGAINST INTERSTATE COMMERCE

For a century or more this Court has been adamant that any state ground must be a tenable ground before this Court will refrain from protecting a litigant's federal rights. The state ground must have fair and substantial support, and local practice may not impose unreasonable obstacles to the assertion of federal rights. *James v. Kentucky*, 466 U.S. 341, 348-49 (1984).

Several states have been furtively seeking ways to discriminate against constitutionally protected classes such as out-of-state people and businesses and, having suffered defeat in this Court time and time again on the federal issues, have turned to fabricating state grounds to hide behind when they discriminate against federally protected

interests. Such is the practical effect here. Presumably, the Alaska Court recognizes that it is forbidden to discriminate against or unreasonably burden interstate commerce (or discriminate based on the length of residence, *Zobel v. Williams*, 457 U.S. 55 (1982)). However, that is exactly what the Alaska Court's decision is doing here. It has masked its opinion with new and unsupported agency rules which apparently apply only to out-of-state persons (or, perhaps, only to out-of-state taxpayers whose taxes would be increased by these rules): that an agent cannot have bare legal title to a bank account or other property, that agency has to be disclosed, that an independent contractor cannot be an agent, that an agent cannot be responsible for its own employees, and that if a party ever sells to another person, that party cannot later become an agent for its client.

None of these grounds is supportable under Alaska law or any other law, and the Alaska Court made no tenable attempt to provide such support. Instead, it issued a "nonopinion," hiding from the public the damage it inflicted on interstate commercial interests.

IV. ALASKA'S CHOICE OF ALASKA LAW AND REJECTION OF CALIFORNIA LAW ON THE ISSUE OF AGENCY UNDULY BURDEN INTERSTATE COMMERCE AND DENY ENGINEER DUE PROCESS OF LAW

Even in the absence of an express choice of law by the contracting parties, fundamental fairness would have required the Alaska court to apply California law on the question of agency. The Restatement (Second) of Conflict of Laws, for example, attempts to identify the state with the most significant relationship with respect to the issue in question, or when appropriate, the contract as a whole, by looking to factual contacts that the transaction has with the concerned states. The relevant contacts to be taken into

account under Restatement §188 include: (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties.

The creation of *ad hoc* Alaska law on the question of agency was unfair because Alaska lacked significant factual contacts with the purchasing agency function, and the contracting parties reasonably could not have anticipated the application of Alaska law to their relationship. More important, and overriding, Alaska does not have a *real* interest in applying its law on the issue of agency. Alaska's tax law would reach the sellers of tangible personal property delivered to Alaska if Engineer were determined to have been a purchasing agent; a decision in favor of petitioners merely means Alaska has directed its assessment powers at the wrong *taxpayer*.

The Due Process Clause of the Constitution imposes limits on the power of a forum state's courts to denigrate sister state law in favor of forum law. The decision of a state court to apply its own law will be found unconstitutional on the grounds of due process when (1) that state has no interest in applying its law on the point in issue, *or* (2) that state does not have sufficient factual contacts with the underlying transaction. Under either of these two approaches, Alaska's choice of Alaska law denies petitioners due process.

The Court's present approach to constitutional limitations on choice of law is reflected in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). In *Shutts*, this Court invalidated on due process grounds a state's application of its own law to govern *all* the claims in a class action arising from several states.

Three royalty owners brought a class action in a Kansas state court, on behalf of royalty owners living in several states, seeking to recover interest on suspended royalty payments on properties in several states. The defendant oil company had delayed payment of a portion of the royalty payments applicable to a price increase which had not yet been approved by government authorities. The Kansas courts applied Kansas substantive law to *all* of the claims in the case; however, it was not clear that the defendant would be liable for interest on the suspended royalty payments under the laws of all of the other states, and the statutory interest rate in some of these states was less than the Kansas interest rate.

This Court held that the application of Kansas law to determine all of the claims was "sufficiently arbitrary and unfair as to exceed constitutional limits." *Id.* at 822. Kansas' status as the forum of this class action, standing alone, did not make it reasonable for Kansas to apply its substantive law to determine the defendant's liability to pay interest where the royalty owners and the land under lease were not in Kansas. These parties could not have foreseen the application of Kansas law to govern their rights under the leases. *Shutts* illustrates the situation in which the application of the forum's law would be *both* arbitrary and fundamentally unfair, and thus, an unconstitutional denial of due process. *Accord, Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

Similarly, it is inescapable that the choice of law determination of Alaska affects interstate commerce in a persistent, subtle and unconstitutional way. Such action tends to balkanize the American economy; and, therefore, that choice must give way to the overriding United States policy of noninterference in matters affecting interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). It is well established that a state law that has the

practical effect of regulating commerce occurring wholly outside that state's borders is invalid under the Commerce Clause. *See, e.g., Healy v. Beer Institute*, 491 U.S. 324 (1989) (beer price statute violates Commerce Clause).

To have thriving, efficient interstate commerce, we need a clear rule that will unambiguously resolve recurring cases, and the likely territorial conception of the average citizen, regarding agency relationships. No state has a substantial enough interest in regulating the manner in which property acquired outside its borders is purchased so as to override an express choice of the law of the situs in which the property is acquired and the situs in which the governing contract is negotiated, signed and in relevant part performed. The justification for recognizing the express choice of law here is that the primary purpose of contract law--to protect the legitimate expectations of the parties and to ensure stability in commercial transactions--will be best served in the interstate context by allowing the parties to choose in advance the law that will govern their rights and liabilities under the contract. Indeed, the Restatement Second takes the position that an express choice of law should be recognized as to matters of validity and enforceability, displacing otherwise applicable law, unless there are cogent reasons for not recognizing the choice in a particular case. Restatement (Second) of Conflict of Laws, §187(1). If Alaska may regulate the terms of a California purchasing agency, so may all the other states, and they need not be uniform in their requirements. The practical effect of such regulation is to control agency contracts beyond the boundary of the state because of the necessity of complying with each state's law so as not to become inadvertently liable as a principal in some state in which the value of one's services or intangibles are utilized.

There should be no doubt that Alaska's definition of agency imposes, in violation of the Constitution, a serious

burden on the interstate commerce conducted by petitioners. Ever since *Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat.) (1824), the states have not been deemed to have authority to impede substantially the free flow of commerce:

> For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter. *Southern Pacific v. Arizona*, 325 U.S. at 769.

There is no difference between state legislation inimical to the free flow of commerce and the Alaska Court's *ad hoc* and arbitrary mischaracterization of an agency relationship which contradicts the relationship expressly and permissibly established by the California Petitioners and their California client. As this Court recognized in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), it is of no federal concern whether state law is embodied in statutes or cases; each is of equal authority. In other words, the state must give due process of law to nonresidents, and the form of the sister state's law is irrelevant.

Alaska may not, consistent with the Commerce Clause (or due process), burden the terms of a contract the object of which is the transportation of articles of commerce from one state to another. *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.*, 169 U.S. 311 (1898); *Central Georgia Railway Company v. Murphey*, 196 U.S. 194 (1905).

V. THERE IS AN URGENT NEED TO CLARIFY THE RULES WHICH APPLY TO CHOICE-OF-LAW DECISIONS IN AN INTERSTATE COMMERCE CONTEXT

Where issues have a dramatic effect on interstate commerce, as here, the need to identify the law requires a minimum degree of certitude. The decision in *Shutts* was based on an earlier test set forth in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981). There, the Court upheld Minnesota's application of its own law to invalidate a clause in an insurance policy issued in Wisconsin to a Wisconsin resident killed in a Wisconsin accident. The plurality opinion of Justice Brennan, joined in by Justices White, Marshall, and Blackmun, treated the test under due process to be coextensive with the test under full faith and credit and stated that test as follows:

> [F]or a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary or fundamentally unfair.

The contacts relied upon were seemingly irrelevant to the legal issues in the case: the decedent's widow moved to Minnesota (after the claim arose), the insurer did business in Minnesota (and every other state), and decedent had worked in Minnesota (but his death was not job related). Apparently the plurality felt that vindication of the rights of a Minnesota employee was an important state concern, which when combined with other Minnesota contacts, rendered the state's choice of law not unconstitutional. It has been opined that, "*Hague* may mean that there are no limits whatever on a state's power to apply its own law to benefit a resident litigant." Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249

(1992). Surely, this is incorrect. People cannot know the law unless they know which law to learn. In the circumstances presented here, where the legal issue concerns the construction and interpretation of a purchasing agency contract between California residents, negotiated and signed in California, and performed in relevant part wholly outside of the forum state, it unduly burdens interstate commerce to dispense with all territorial considerations in determining choice of law and to choose the law of a forum with whom a party has some significant contacts--but no contact relating to the precise legal issue upon which judgment depends.

If Alaska wants a custom-made agency rule to control for purposes of Alaska tax law, it may enact it as part of the governing tax statute; Alaska, however, may not create rules on an *ad hoc* basis to sandbag sister states' residents performing contracts in interstate commerce. When the Alaska Court adopts such *ad hoc* agency rules, the unfair surprise imposed on out-of-state taxpayers violates elemental principles of due process; and the emanations of uncertain rules impermissibly burden interstate commerce.

CONCLUSION

An adjudicative mechanism which favors local litigants and local law over residents and laws of other states is unconstitutional. Courts owe equal concern and equal respect to residents of other states. Courts owe equal respect to sister state law. The decision in this case is evasive and lacks any substantial or adequate state grounds in its support--even worse, however, is the systemic bias which perpetuated the decision, created by an adjudicative mechanism in which a court decision in favor of a nonresident may be disregarded when the head of the administrative agency against which it was decided so rules.

For the reasons set forth herein, The Parsons Corporation and The Ralph M. Parsons Company respectfully request that the decision of the Alaska Court be reversed and that the well-reasoned decision of the Lower Court be followed.

Respectfully submitted,

Lance B. Gordon
(Counsel of Record)
Jordan P. Weiss
The Parsons Corporation
T-1105
100 West Walnut Street
Pasadena, California 91124
Telephone: (818) 440-3010
FAX: (818) 440-2923
Dated: March 31, 1993
Counsel for Petitioners